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No. 83-2041

IN THE SUPREME COURT OF THE UNITED STATES

C.G. BILLMEYER, MELVIN MORGAN, F.W. "BILL" ROSKELLEY, JOHN EVANS, DONNA BOE, WAYNE ELLIS, and the CITY OF POCATELLO, an Idaho Municipal Corporation,

Petitioners,

vs.

JOSEPH TOVAR and DEBORAH ANN MOORE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether or Not this Court Should Exercise Jurisdiction to Grant the Petition for Writ of Certiorari in Light of Petitioners' Failure to Make Timely Application.

2. Whether or Not Respondents' Claims Pursuant to 42 U.S.C. §1983 Can Be Heard When Those Claims Were Reserved by Respondents at the Time of Pursuing a State Court Action.

3. Whether the District Court's Granting of Petitioners' Motion for Summary Judgment was Proper in Light of Facts Demonstrating Unconstitutional Motivation.

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STATEMENT OF CASE

In the Petition for Writ of Certiorari, Petitioners set forth the factual and procedural history of this case. However, there are additional facts which will be helpful in the consideration of Petitioners' arguments.

On April 12, 1976, the United States District Court entered an Order granting a Motion to Abstain. See Appendix Q-1, et seq., Memorandum decision of Judge J. Blaine Anderson, United States District Judge. As indicated in that Memorandum, and not disputed by Petitioners, the Respondents filed a Reservation of Rights in state court. This Reservation of Rights and the District Court's reliance upon Railroad Comm'n. of Texas v. Pullman, 312 U.S. 496 (1941) reserved for Respondents the right to return to federal court on questions of federal law after the state

court had the opportunity to rule on state claims. Appendix Q-1, et seq. See also Appendix J, Petitioners' Petition, at J-4.

In 1979, upon the first consideration of this case, the United States Court of Appeals for the Ninth Circuit upheld Respondents' right to reserve federal questions and recognized the validity of federal abstention under Pullman. Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir., 1979).

The Court of Appeals for the Ninth Circuit based its reversal of the District Court's Order granting Petitioners' Motion for Summary Judgment upon the following facts: the primary purpose of the City Council's zoning decision was to prevent Respondents' adult theater from operating in Pocatello; the building inspector was ordered by the Mayor to deny the building permit; no other City Council meeting had ever been held to deny a building permit

prior to the submission of an application; and finally, the new interpretation given to the City's zoning code in light of the above facts. Tovar v. Billmeyer, 721 F.2d 1260 (9th Cir., 1983). Appendix K, Petitioners' Petition, K-13-16.

The remaining facts necessary to resolve this Petition are adequately set forth in Petitioners' Petition.

SUMMARY OF ARGUMENTS

I.

A Petition for Writ of Certiorari must be brought within ninety days of the date of decision and order of the Court of Appeals. This rule is only modified where a timely Petition for Rehearing is filed. Petitioners failed to timely file a Petition for Rehearing and did not file their Petition for Writ of Certiorari within the ninety day time period between

the date of judgment and the expiration date for filing the Petition.

Furthermore, Petitioners did not file a Petition for Writ of Certiorari from the first decision of the Ninth Circuit Court of Appeals in 1979 and because that decision resolved issues unrelated to the second appeal and decision, this Court cannot reopen the questions decided therein. The first appeal decided the questions of abstention and reservation of federal claims.

Petitioners have also failed to indicate a conflict between any decision of this Court and the results reached below. Respondents at all times reserved their right to proceed in federal court on their federal claims. This reservation of rights was recognized by both the Federal District Judge and the Ninth Circuit Court of Appeals. The Respondents did not seek to

enjoin or otherwise interfere with any state proceeding. Therefore, the courts below properly applied the Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941), abstention doctrine, allowing Respondents to first litigate claims in state court and then proceed in federal court on the federal claims.

It would be inequitable for this Court to retroactively apply a new procedural standard in Respondents' case, as Respondents relied upon the previous procedural rules and findings of the courts in question. Additionally, abstention under Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982), is also not required because two of the four prongs of the test are not met in this case.

Respondents are entitled to bring their §1983 claims in federal court because

they specifically reserved those claims in the state proceedings. Respondents' §1983 claims state a cause of action as they concern an infringement of a fundamental right unrelated to due process.

Finally, the Ninth Circuit Court of Appeals properly applied the Ebel v. City of Ccrona, 698 F.2d 340 (9th Cir., 1983), rule to this case as zoning procedures and regulations are subject to constitutional scrutiny.

REASONS FOR DENYING THE PETITION

A review on Writ of Certiorari is not a matter of right, but of judicial discretion. As indicated in Rule 17, Rules of the Supreme Court, it will be granted "only when there are special and important reasons therefor." Rule 17, Rules of the Supreme Court. The Petitioners have failed to indicate any special or important reasons as to why this Court should grant their Petition.

I

THIS COURT SHOULD DENY THE PETITION AS BEING JURISDICTIONALLY OUT OF TIME PURSUANT TO RULES OF THE SUPREME COURT.

A.

THE PETITION FOR WRIT OF CERTIORARI WAS FILED AFTER THE EXPIRATION OF THE APPLICABLE TIME LIMITS FOR FILING A PETITION FOLLOWING THE DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ISSUED ON DECEMBER 15, 1983.

As indicated in the Petition in this case, on May 4, 1984, Associate Justice W. H. Rehnquist signed an Order extending the time for filing a Petition for Writ of Certiorari to and including June 11, 1984, reserving for the Court's later consideration the question of whether the time for filing the Petition for Writ of Certiorari ran from the Order of the United States Court of Appeals for the Ninth Circuit on February 7, 1984, or from the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit dated December 15, 1983. An analysis of the applicable rules and facts in this case indicate that the time limitations ran from December 15, 1983, and therefore, the Petition was filed jurisdictionally out of time and cannot be considered pursuant to Rule 20.3 of the Rules of the Supreme Court.

The opinion and decision upon which this Petition for Writ of Certiorari is based was entered December 15, 1983, by the Court of Appeals for the Ninth Circuit. See Appendix J, Petitioners' Petition. Petitioners filed a "Suggestion for En Banc Consideration" on or about December 22, 1983. See Appendix M-1, Petitioners' Petition. On January 31, 1984, Petitioners filed a "Supplemental Suggestion, Petition for Rehearing, and Request for Hearing En Banc". See Appendix M-2, Petitioners' Petition. Subsequently, on February 3, 1984, Petitioners filed their "Motion to Enlarge the Time for Filing and to Late File the Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc". See Appendix M-3, Petitioners' Petition. The Court of Appeals on February 7, 1984, issued an Order denying Petitioners' December 22, 1983, Suggestion

for En Banc Consideration. See Appendix N, Petitioners' Petition. On February 21, 1984, the United States Court of Appeals for the Ninth Circuit denied Petitioners' Motion to Enlarge the Time for Filing and to Late File Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc. See Appendix O, Petitioners' Petition. The Court of Appeals did not consider Petitioners' January 31, 1984, Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc.

Rule 20 of the Rules of the Supreme Court establishes the time for petitioning for review on certiorari. Subdivision 20.4 of that rule indicates:

> "The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent

> under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing a petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or on the entry of a subsequent judgment entered on the rehearing." Rule 20.4, Rules of the Supreme Court. (emphasis added)

In this case, the applicable time limit for filing the Petition for Writ of Certiorari is ninety (90) days. See Rule 20.2, Rules of the Supreme Court; 28 U.S.C. §2101(c). Any application for extension of time in which to file a Petition for Writ of Certiorari, besides setting forth the specific reasons why extension of time should be granted, must be applied for at least ten days before the specified final filing date. See Rules 20.6 and 29, Rules of the Supreme Court. Petitioners maintain their Writ of Certiorari was timely by

starting the ninety day limit on the date the appellate court denied their "Suggestion for En Banc Consideration" by asserting that such Suggestion was equivalent to a Petition for Rehearing. However, such assertion cannot stand in light of the Federal Rules of Appellate Procedure.

Under the Federal Rules, there is a clear distinction between a Petition for Rehearing and a Suggestion for a Rehearing En Banc. Rule 35 of the Federal Rules of Appellate Procedure provides in pertinent part:

> "A suggestion for a rehearing en banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not effect the finality of the judgment of the Court of Appeals or stay the issuance of the mandate." Rule

35(c), Federal Rules of Appellate Procedure. See also Vol. II, Lawyer's Edition, §3:751.

Rule 12 of the Ninth Circuit Court of Appeals Rules requires if one desires to combine a suggestion of rehearing en banc with a petition for rehearing, that reference must be made to both the suggestion for rehearing en banc as well as the petition for rehearing on the cover of the combined petition and suggestion. Rule 12, Ninth Circuit Court of Appeals Rules, Appendix R.

Petitioners' Suggestion for En Banc Consideration filed on December 22, 1983, is just that and not a Petition for Rehearing. It does not comply with Rule 12 set forth above. See Appendix M-1, Petitioners' Petition. Furthermore, it does not satisfy the Rule 40 requirements for a Petition for Rehearing. In fact,

Petitioners filed their suggestion pursuant to Rule 35 and not Rule 40 of the Federal Rules of Appellate Procedure. A review of the record pertaining to the first appeal to the Ninth Circuit in this case, which occurred in the fall of 1979, indicates that the Petitioners in this case understood the requirements of the rules by filing the appropriate Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc concerning the first appeal.

Therefore, the filing by Petitioners of a Suggestion for En Banc Consideration on December 22, 1983, does not constitute the filing of a Petition for Rehearing and had no effect on the applicable time limits.

A Petition for Rehearing must be filed fourteen days after entry of judgment. Rule 40(a), Federal Rules of Appellate

Procedure. The Petitioners' "Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc" was filed on January 31, 1984, well after the expiration of the fourteen day time limit. On February 3, 1984, Petitioners attempted to cure their late filing of the Petition for Rehearing by filing a "Motion to Enlarge the Time for Filing and to Late File Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc". See Appendix M-3, Petitioners' Petition. The Court of Appeals for the Ninth Circuit denied Petitioners' Motion to Late File. Appendix O, Petitioners' Petition.

Petitioners cite to Stern & Gressman, Supreme Court Practice, 5th Ed., §6.3, pps. 398-400, to support the proposition that the time limits for filing the Petition for Writ of Certiorari began on February 7, 1984. However, that reliance is based upon

the incorrect assumption that the Suggestion for En Banc Consideration constituted a Petition for Rehearing. Stern & Gressman specifically indicate that a denial of a Motion for Leave to File a Petition for Rehearing Out of Time does not extend the time for filing appeals. Stern & Gressman, Supreme Court Practice, 5th Ed., §6.3, p. 399. The fact that the Court of Appeals intended to deny Petitioners' Application to Late File their Petition for Rehearing is further buttressed by the fact that the Court of Appeals did not to consider the January 31, 1984, Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc.

The Petitioners did not file a Petition for Rehearing within fourteen days from the date of judgment. The Court of Appeals denied Petitioners' Motion to Enlarge the Time for Filing and to Late

File Supplemental Suggestion, Petition for Rehearing and Request for Hearing En Banc. Because a Petition for Rehearing was not filed within the first fourteen days following judgment, Petitioners' time limit for filing a Petition for Writ of Certiorari must be computed from the date judgment was entered. That date is December 15, 1983. Pursuant to the applicable rules, Petitioners were required to file their Petition for Writ of Certiorari by March 14, 1984, or request an extension of time to file that petition on or before March 4, 1984. Petitioners failed to comply with either time limit and, thus, their Petition for Writ of Certiorari should not be accepted by the Court.

B.

THIS COURT SHOULD NOT REOPEN ISSUES DECIDED IN THE FIRST APPEAL TO THE UNITED

STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT WHICH WERE
DECIDED ON NOVEMBER 6, 1979.

Petitioners failed to file a Petition for Writ of Certiorari from the Opinion of the United States Court of Appeals for the Ninth Circuit dated November 6, 1979. Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir., 1979). That Opinion dealt with the question of abstention and the ability of Respondents to assert their §1983 claims in federal court. The questions raised and decided in that appeal were not affected by the subsequent decision by the United States Court of Appeals for the Ninth Circuit dated December 15, 1983. Therefore, even if this Court feels that the Petitioners did not violate the time limits discussed above, the Petition must be limited to a consideration of only those issues which were discussed and decided by the United States Court of Appeals in its

second decision. See Federal Trade Comm'n. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952); Federal Trade Comm'n. v. Colgate-Palmolive Company, et al., 380 U.S. 374 (1965).

Thus, all issues in this Petition for Writ of Certiorari pertaining to abstention or the question of the ability of federal courts to entertain the §1983 action relate to the first appeal, and since the subsequent appellate decision did not have any affect on that first appeal, this Court should refuse to entertain any questions or issues relating to the propriety of the District Court deciding the §1983 questions.

C.

THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY CONSIDERATION OF THE PETITION BECAUSE OF THE NATURE OF PETITIONERS' PETITION.

Rule 21.5 of the Rules of the Supreme Court provides that a petitioner's failure to present with accuracy, brevity, and clearness whatever is essential to the ready and accurate understanding of the points requiring consideration may be sufficient reason for denying a petition. Rule 21.5, Rules of the Supreme Court.

In this case, the questions presented in the Petition for Writ of Certiorari are unclear and the issues muddled. Additionally, Petitioners' inexplicably numbered three pages 26(a), 26(b) and 26(c), making their Petition three pages over the limitation imposed by Rule 33.3 of the Rules of the Supreme Court. Therefore, Respondents request this Court exercise its discretion and deny the Petition.

II

RESPONDENTS PROPERLY PRESERVED THEIR FEDERAL RIGHTS IN FEDERAL COURT AND MUST BE ALLOWED TO

LITIGATE THOSE RIGHTS IN THE FEDERAL DISTRICT COURT.

The Ninth Circuit Court of Appeals in an Opinion rendered December 15, 1983, remanded this case to the District Court for a trial upon the merits after finding that Respondents had properly reserved their federal claims and instructed the trial court to examine the question of whether or not there was an unconstitutional motivation underpinning the zoning decisions made in this case in violation of the First Amendment to the United States Constitution. See Appendix K, Petitioners' Petition. This issue, along with the related issues of whether or not the regulations in question are reasonable pursuant to the First Amendment protections of speech in question, does not require the interpretation or the

application of any state statutes or local ordinances.

The procedural history of this case is such that the state courts have had full opportunity to litigate various issues. Petitioners' Petition, pps. 3-25. The state courts, however, from the various decisions rendered, never directly addressed the freedom of speech claims presented by Respondents even though such questions were raised before them. See Tovar v. Billmeyer, 98 Idaho 891, 575 P.2d 489 (S.Ct., 1978). Appendix I, Petitioners' Petition. The state courts' decisions in this case concern the general arbitrary and capricious standard of review applied in zoning cases. Respondents have at all times reserved their right to bring the federal questions, including the First Amendment question, before the federal

court. Appendix K-25, Petitioners' Petition.

The following discussion will indicate the propriety of a trial on the merits in the Federal District Court in this action as ordered by the Ninth Circuit Court of Appeals. It is Respondents' contention that this discussion is not necessary as Petitioners failed to bring a Writ of Certiorari concerning the abstention issues decided in the first appeal to the Ninth Circuit and, therefore, should be precluded from raising this argument in this Petition. However, even if the Court feels that this Petition was timely filed and that the Petition can re-open arguments settled on appeal in 1979, the following analysis indicates the Court should not grant the Writ of Certiorari.

A.

RESPONDENTS' FULL RESERVATION OF FEDERAL RIGHTS IN THE STATE PROCEEDING COMBINED WITH THE PULLMAN ABSTENTION EXERCISED AND AFFIRMED BY THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS PERMIT CONSIDERATION OF RESPONDENTS' §1983 CLAIMS IN FEDERAL DISTRICT COURT.

As stated by this Court, there are two primary types of federal abstention -- Pullman abstention and Younger abstention. Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 477 (1977). In this case, the District Court and Court of Appeals applied Pullman abstention by withholding judgment on Respondents' reserved federal claim until after the state courts had an opportunity to address the issues. See Appendix Q, Opinion of the District Court; Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir., 1979); Appendix J, Petitioners' Petition. A brief discussion of the two primary doctrines of federal

abstention indicates the propriety of these decisions.

Pullman abstention involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute or procedure so as to eliminate or at least to alter materially a constitutional question presented. Railroad Comm'n v. Pullman Company, 312 U.S. 496 (1941); Hodory, supra, 431 U.S. at 477. In this case, it was possible that the state courts would decide that the statute or the procedures employed by the City Council of Pocatello were violative of a state statutory or constitutional provision which would obviate the necessity of the District Court proceeding on Respondents' federal claims. Therefore, abstention under Pullman was appropriate in order to allow the state courts an opportunity to resolve the issues.

The second type of abstention pursuant to the doctrine is Younger abstention. In Younger, the court is primarily concerned, in an equitable setting, with considerations of comity and federalism, both as they related to the state's interest in pursuing an on-going state proceeding, and as they involved the ability of the state courts to consider federal constitutional claims in that context. Younger v. Harris, 401 U.S. 37 (1971); Hodory, supra, 431 U.S. at 477. It is this type of abstention which Petitioners assert should have been applied in this case. See argument I, p. 29; Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982). There are three independent reasons why this Court should not accept Petitioners' assertion.

1.

THE YOUNGER RATIONALE IS NOT APPLICABLE TO THE FACTS AT BAR.

While it is true that the principles of federalism recognized in Younger, supra, have not been limited to federal court interference in state criminal proceedings, they have been specifically limited in their application to federal cases which seek to enjoin state judicial proceedings; a limitation which has not been abandoned by the Court. Fair Assessment in Real Estate Ass'n. v. McNary, 454 U.S. 100, 112 (1981). It is evident, from a review of the authorities in which the Younger doctrine has been applied, that this Court has limited the application of that doctrine, even in cases involving §1983 actions, to factual situations wherein the party seeking relief in the federal courts was attempting to avoid some type of action

brought against them in state tribunals. See Middlesex County Ethics Committee, supra (attempt to avoid New Jersey state disciplinary proceedings); Younger, supra (attempt to obtain Federal Court equitable relief against prosecution in state court); Trainor v. Hernandez, 431 U.S. 434 (1977) (attempt to seek Federal intervention in pending civil enforcement suit filed in state court by welfare agency); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (attempt to obtain Federal declaratory and injunctive relief seeking to enjoin execution of a state court judgment without exhaustion of state appellate remedies); Juidice v. Vail, 430 U.S. 327 (1977) (party seeking Federal relief that had ignored state-court proceedings for a period of more than nine (9) months sought to have the statutory provisions authorizing contempts enjoined as unconstitutional);

Moore v. Sims, 442 U.S. 415 (1979) (parties sought federal court injunctive relief of state court Department of Human Resources child custody actions); McNary, supra (requested federal action which would act to enjoin state law tax collection).

Thus, Younger abstention has no application to the case at bar in that Respondents are not seeking to interfere with any state proceeding; indeed, Respondents have already exhausted all state avenues of relief.

2.

RESPONDENTS HAVE ACTED IN RELIANCE UPON THE PRIOR FINDING OF PULLMAN ABSTENTION AND APPLICATION OF YOUNGER ABSTENTION AT THIS POINT WOULD BE INEQUITABLE.

Respondents, as stated previously, reserved their right to proceed in Federal court upon Federal claims. Based upon this reservation and the Pullman abstention exercised by the District Court, the Court

of Appeals ruled in its first decision that the District Court must entertain the federal claims of Respondent. Petitioners now request, after allowing four years to elapse, that this Court fashion a new procedural rule requiring that federal courts, henceforth, apply Younger absention in similar cases. If such a rule were adopted by this Court, Respondents would be precluded from litigating their First Amendment claims by the enactment of a procedural rule which did not exist and which was not applied by the courts at the times in question.

Thus, even if this Court decides that Younger abstention is appropriate in such cases as Respondents', it should hold that its decision is non-retroactive and does not apply in Respondents' case. See Cipriano v. City of Houma, 395 U.S. 701

(1969); 20 Am. Jur. 2d, §233, p. 562; U.S. v. Zirpolo, 450 F.2d 424 (3rd Cir., 1971).

3.

YOUNGER ABSTENTION, AS SET FORTH IN MIDDLESEX IS NOT SATISFIED IN THIS CASE.

Even if this Court decides that the Younger abstention doctrine as put forth in Middlesex should generally be applied in this type of case, and even if the Court decides that such doctrine can be applied retroactively, the specific facts in this case do not satisfy the Middlesex four-part test.

Petitioners first indicate that Middlesex sets forth a four-part test. Petitioners then attempt to modify this test by claiming that only the first three parts need be met, if the provision in question is susceptible of a constitutional construction in state court. See Petitioners' Petition, pps. 40-41.

However, this reading misconstrues the language of Huffman cited on p. 40 of Petitioners' Petition. Huffman, in the cited language, held that the District Court could intervene if it finds a state proceeding is motivated by a desire to harass or is conducted in bad faith or where the statute is flagrantly violative of express constitutional prohibitions. Huffman, supra, at 496. Petitioners attempt to assert that if one of these exceptions is not met in the case, then the fourth part of the Middlesex test is satisfied. However, it is clear that what the Court has ruled is that any one of the exceptions, if they exist, are sufficient to justify federal intervention.

Therefore, This case does not satisfy two of the four prongs of the Middlesex test. It does not satisfy the first prong which requires the existence of a state

action. There is no state action pending with which federal court action would interfere. Furthermore, if this Court orders abstention at this juncture, Respondents would be precluded from seeking relief in any tribunal.

This case does not meet the fourth part of the test as the Ninth Circuit Court of Appeals has already held that the facts on record indicate that there is evidence of unconstitutional bad faith. See Appendix K, Petitioners' Petition, K-18-25. This evidence renders abstention inappropriate. Therefore, because two of the four parts of the Middlesex test are not satisfied in this case, abstention under that doctrine is inappropriate and there is no error in the decision of the Court of Appeals.

B.

RESPONDENTS ARE ENTITLED TO BRING THEIR §1983 ISSUES IN FEDERAL COURT.

Petitioners urge that this Court's recent decision in Migra v. Warren City School Dist. Bd. of Ed., ____ U.S. ____, 79 L.Ed.2d 56 (1984) requires this Court to hold that Respondents are precluded from raising any issues which were or could have been raised in the state court proceeding. However, Petitioners' assertion is not valid as Respondents reserved their federal rights and were informed by both the Federal District Court and the Court of Appeals for the Ninth Circuit that such Federal rights had been reserved. See Appendix Q; Appendix K, Petitioners' Petition.

The significance of this reservation in relation to the Migra decision is evident when one considers footnote 7 of

that decision which states in pertinent part:

> "In the event that a §1983 plaintiff's federal and state law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, e.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)." Migra, supra, 79 L.Ed.2d at 64.

Respondents have performed the exact steps which this Court in Migra said were required to be performed in order to preserve a party's ability to raise §1983 claims in federal court after first proceeding in state court.

Petitioners' reliance upon Allen v. McCurry, 449 U.S. 90 (1980) and Scoggin v.

Schrunk, 522 F.2d 436 (9th Cir., 1975) is similarly misplaced. In Allen, the Court specifically noted the exception to the preclusion rule when a party reserves its right to proceed in federal court on federal issues. See Allen, supra, 449 U.S. at 102, footnote 17. Scoggin likewise did not involve a case where the party seeking relief had previously reserved the right to proceed in federal court on federal issues.

This doctrine of issue preservation and its effect on preclusion was applied by the Court of Appeals for the Ninth Circuit in its second decision at footnote 8. See Appendix K, Petitioners' Petition at K-25. Therefore, because Respondents reserved their right to proceed in federal court on federal questions, they are entitled to do so at this time.

Petitioners also assert that this Court's decision in Parratt v. Taylor, 451

U.S. 527 (1981), requires a finding that Respondents' §1983 action fails to state a claim upon which relief can be based. However, Petitioners have misapplied the Parratt decision.

In Parratt, this Court set forth three prerequisites which must be met in order to bring due process claims under §1983. Parratt, supra, 451 U.S. at 536. If the complaint states a claim under §1983 based upon any constitutional or statutory provision other than the due process clause of the Fourteenth Amendment, a claim under §1983 and the Parratt requirements do not have to be met. Juncker v. Tinney, 549 F.Supp. 574, 582 (D.C. Md., 1982). Because Respondents' claim is based upon a First Amendment violation and not due process, Parratt and Petitioners' analysis do not apply in this case. Petitioners' reliance upon Vicory v. Walton, 721 F.2d 1062 (6th

Cir., 1983) is also subject to the same limitation as Vicory concerned a claim of denial of procedural due process. Vicory, supra, 721 F.2d at 1065.

III

THE COURT OF APPEALS PROPERLY RELIED UPON AND APPLIED THE DECISION IN EBEL V. CITY OF CORONA.

Petitioners assert that the Court of Appeals lacked jurisdiction over the subject matter to inquire into the motivation of the City Council in enacting zoning legislation. See Petitioners' Petition, pps. 61-63. However, the Court has long analyzed zoning regulations and their effect on fundamental rights such as those under the First Amendment. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Young v. American Mini-Theaters, 427 U.S. 50 (1976).

Even if this Court is inclined to agree with the concurring opinion of Circuit Judge Wallace that the "real purpose" test of Ebel should be applied as opposed to "a motivating factor test", the decision of the Court of Appeals must still be upheld as Judge Wallace agreed, even under his standard, that the facts precluded granting summary judgment. See Appendix K, Petitioners' Petition, K-26-27.

The Petitioners assert that the factual record indicates that all the official proceedings, including the meetings of the City Council, were fair on their face. Petitioners' Petition, p. 62. However, as found by the Court of Appeals for the Ninth Circuit, there exist numerous facts which would indicate that the zoning restriction in this case unconstitutionally violates the First Amendment. See Appendix K, Petitioners' Petition, pps. 18-25.

CONCLUSION

Petitioners have failed to timely file their Petition for Writ of Certiorari. Petitioners have also failed to indicate any conflict between the decisions reached in this case and any decision of this Court or other Federal Courts. Finally, Petitioners have not demonstrated error in the Court of Appeals application of the Ebel standard of review. Therefore, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

DATED this 10th day of August, 1984.

STOMPOLY & EVEN, P.C.

By _____
William G. Walker
Attorneys for Respondents

APPENDIX "Q"

Memorandum decision in the United States District Court for the District of Idaho in Joseph Tovar and Deborah Ann Moore v. C.G. Billmeyer, Melvin Morgan, F.W. "Bill" Roskelley, John Evans, Les Purce, Donna Boe, Earl Pond, Wayne Ellis, and The City of Pocatello, an Idaho municipal corporation, Civil No. 4-75-59, April 13, 1976.

. . . Q-1 through Q-14.

(Reference: See Brief in Opposition to Petition for a Writ of Certiorari at page 1.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOSEPH TOVAR and DEBORAH ANN MOORE, Plaintiffs,	)	Civil No. 4-75-59
vs.	)	M E M O R A N D U M
C.G. BILLMEYER; MELVIN MORGAN; F. W. "Bill" ROSKELLEY; JOHN EVANS; LES PURCE; DONNA BOE; EARL POND; WAYNE ELLIS; and THE CITY OF POCATELLO, an Idaho municipal corporation, Defendants.	)	

This action is presently before the Court on defendants' motions to dismiss and to abstain, filed on January 20, 1976, by each of the nine named defendants. As the motions filed are, in most respects, identical, they will be treated as one motion. The parties have filed original briefs and a reply brief has been filed by the defendants and the matter is submitted.

On December 22, 1975, the present action was filed in this Court under 42 U.S.C. §1983 seeking injunctive relief, declaratory relief and damages. The plaintiffs' prayer for relief asks this Court to declare the zoning ordinance of the City of Pocatello and its provisions as unconstitutional on its face and as applied, to declare invalid the City Council's October 23, 1975, hearing and decision, to reinstate the Board of Adjustment's decision, to enjoin the defendants from initiating any action contesting that the plaintiffs' proposed use is not in accordance or contrary to the zoning ordinance, a judgment for lost profits, attorneys' fees and punitive damages.

Concurrently, there was filed on December 9, 1975, in the Sixth Judicial District of Idaho, an action by one of the present plaintiffs, Deborah Ann Moore,

entitled Petition to Review Denial of Variance. Named as defendants were eight of the nine present defendants, with the exception of defendant Wayne Ellis. On February 11, 1976, the Honorable George W. Hargraves issued his Memorandum Decision and Order which reversed the City Council's decision of October 23, 1975, and remanded the matter back to the City Council for further proceedings and consideration in conformity with his Order. That is presently the status of the state court action.

Both of these actions arise out of the same following factual background. In September, 1975, plaintiffs purchased certain property, on which they sought to house their proposed adult bookstore and theater. On October 8, 1975, plaintiffs' application for a conditional use permit was approved by the Board of Adjustment for the City of Pocatello. On October 9,

1975, an appeal from that decision was taken by the Downtown Merchants Association to the City Council. On October 23, 1975, the City Council held a hearing to review that decision, which resulted in a reversal of the Board of Adjustment's decision and the Council refused to issue to plaintiffs a conditional use permit for the operation of their theater. Whereupon, the two above actions were filed.

At the outset, we are mindful that when the exercise of authority by state officials is attacked, federal courts must be constantly aware of the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of it own law." Stefanelli v. Minard, 342 U.S. 117, 120, 72 S.Ct. 118, 96 L.Ed. 138 (1951). Also, this Court must recognize that ours is a system in which "the National Government, anxious though it may be to vindicate and

and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), quoted in Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

With this background, we must scrutinize plaintiffs' state court complaint and the present complaint to determine if it is proper for this Court to stay its hand in deference to the state court so as not to "unduly interfere" with the state court action.

The declaratory relief sought by the present plaintiffs has, at least in part, been remedied by the state court. That court has already reversed the October 23, 1975, decision of the City Council, thereby reinstating the Board of Adjustment's decision which mandates as unwarranted

any declaration by this Court to that effect. Similarly, it would appear unwise for this Court to prematurely declare the zoning ordinance under which any conditional use permit may be granted as unconstitutional. This is so because the state matter is on remand to the City Council, and, while this Court cannot prognosticate what action will be taken, certainly, the City Council may reverse itself and issue the desired conditional use permit to the plaintiffs. Likewise, if the City Council does not change its position, the very able state court judge may determine that the ordinance is unconstitutional. Thus there are questions of state law that may dispose of the necessity for this Court to decide constitutional questions. Railroad Commission of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Additionally, as zoning is particularly of local concern,

this Court would be interfering with the administration by a state of its own affairs if this Court were to grant the declaratory relief sought. As the Supreme Court stated in Alabama Public Service Comm. v. Southern R. Co., 341 U.S. 341, 349, 71 S.Ct. 762, 95 L.Ed. 1002 (1951):

> "As adequate state court review of an administrative order based upon predominately local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights." 1/

The present plaintiffs also seek to enjoin the defendants from instituting any action challenging plaintiffs' use as being contrary to the City's zoning ordinance. It has been held in Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), that actions under 42 U.S.C. §1983 are within the expressly authorized exceptions to the anti-injunction statute, 28 U.S.C. §2283. The granting of such injunctions, to be proper, must be within the

certain exceptional circumstances laid down in Younger, supra. One such circumstance is where there is a showing of "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." Younger, supra, 401 U.S. at 54. The present plaintiffs have alleged bad faith harassment on the part of the defendants. The injunction plaintiffs seek is for future actions. The question then becomes whether any perceived threat to plaintiffs is sufficiently real and immediate to show an existing controversy. It appears that plaintiffs are merely anticipating the filing of future actions and have presented no evidence in the record other than their allegations to establish such a real threat. See, Gregory v. Gaffney, 322 F.Supp. 238 (D.C. N.C. 1971).

Additionally, there is another reason why this Court should stay its hand in granting any injunctive relief. As the

Supreme Court in Mitchum stated:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding."
> 407 U.S. at 243.

For this Court to enjoin prematurely the actions of these defendants would be to deny them the effective administration of their duties and be at serious odds with the notions of comity and federalism.

The remaining claims by the plaintiffs are those seeking money damages sounding in tort and also money damages by virtue of the alleged bad faith harassment pursuant to 42 U.S.C. §1983. Clearly, the state courts have concurrent jurisdiction over civil rights cases. Long v. District of Columbia, 469 F.2d 927 (D.C. Cir. 1972). Therefore, the present §1983 claims arising out of a common nucleus of operative fact could have been brought in state court. Again, the notions of comity and

federalism would dictate that this Court stay its hand and let the state court render its decision. For the same reasons, plaintiffs' claims sounding in tort which seek to invoke the pendent jurisdiction of this Court must also submit to the notions of comity and federalism.

It should be noted that plaintiffs, by their state court counsel, have filed a Reservation of Constitutional Questions in that state action. This was notice filed on February 2, 1976, pursuant to the authority of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). It would appear from a reading of England that the notice filed was premature. England held that if a litigant in federal court is remitted to a state court under the doctrine of abstention, he may preserve his right to return to federal court by refusing to litigate his federal conten-

tions in state court. (My emphasis). In England the parties first filed their action in federal court and a three-judge court abstained, allowing the state courts an opportunity to determine the issues presented, which is just the opposite situation here in the present case.

For this reason, it would be proper for this Court to retain jurisdiction but to stay its hand pending determination of the issues in state court. The notice of reservation was not filed until nearly two months after the initiation of the state court action and almost a month and a half after the filing of this action. Having chosen the state court forum initially, this reservation only secures for plaintiff his right to return to federal court should the state court not resolve the federal questions to his satisfaction. Clearly, this notice does not prevent this Court from exercising its discretion to await

determination by a state court when the principles of comity and federalism apply.

In conclusion, there does not appear to be any compelling reason why this Court should not observe the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law." Stefanelli, supra. The litigants have chosen the state court forum initially where there is available full remedy for all of their rights and the same factual background is before that forum. For this Court to proceed and make a determination on the merits would have the possibility of issuing conflicting decisions which would thereby defeat the principles of comity and federalism.

Accordingly,

IT IS HEREBY ORDERED that the defendants' motions to dismiss are DENIED and the defendants' motions to abstain are GRANTED.

IT IS FURTHER ORDERED that this matter will be held in abeyance pending further proceedings in the state district court. Counsel for the parties will keep this Court advised periodically as to the progress of those proceedings.

DATED this 12th day of April, 1976.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge

FOOTNOTES

1/ While this action involved an injunction against enforcement of a statute which has not been sought in the instant case, the underlying notions of comity are relevant.

APPENDIX "R"

Rule 12. Suggestion of Appropriateness of Rehearing En Banc

Where a suggestion of the appropriateness of a rehearing en banc, made pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is made as part of a petition for rehearing, a reference to such suggestion, as well as to the petition for rehearing, shall appear on the cover of the combined petition and suggestion; and unless this is done the court shall not be required to consider such suggestion. (As amended June 9, 1971; March 1, 1979; October 1, 1981.)

(Reference: Federal Procedure L. Ed., Appeal, Certiorari, and Review, §3:750.)